United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-6104

In The
UNITED STATES COURT OF APPEALS
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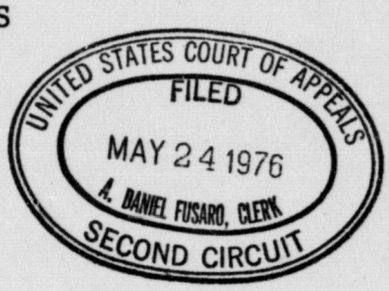

Docket No. 75-6104

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SALVATORE CIRAMI, Et Al.,
Defendants,

SALVATORE CIRAMI & MARGARET CIRAMI,
Defendants-Appellants.

B P/S

PETITION FOR REHEARING

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The appellants above named respectfully petition the Honorable Court for a rehearing of the appeal in the above-entitled cause, and in support of this petition represent to the Court:

We reserve our argued position as to each of the points of appeal, but in this petition address ourselves solely to those features of the decision wherein we believe the Court

may be convinced its result is based upon the application of incorrect legal principles.

Therefore this petition is devoted to convincing this Court that it has erred in its failure to consider whether the manner in which summary judgment was taken, appellants third major question on appeal, presented "extraordinary circumstances" under Rule 60(b)(6) of the Federal Rules of Civil Procedure. Further, appellants believe this Court was unaware of certain facts, pertaining to the decision of the Court below, which would justify a remand for an evidentiary hearing.

At page 3653 of the Slip Opinion this Court noted that "exceptional circumstances" must be presented to sustain a motion pursuant to Rule 60(b)(6). This Court thereafter stated:

> The "equity" urged here is essentially that appellants have been subjected to a substantial judgment which was erroneously entered.
> (Slip Op. 3653)

The appellants' position is more fundamental. As set forth in Point III of appellants' brief (pp. 22-26), appellants asserted that as a matter of law the Court below erred in granting summary judgment since material issues of fact

existed, which facts the government had full knowledge of at the time the motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, was made.

The government knew full well that wholesale disallowances could not be sustained, where gross receipts were accepted as filed, because the profit ratio which resulted (see p. 14 of appellants' brief)was incredulous. As Judge Friendly noted during oral argument, to have such a profit, "magical" trucks had to be utilized. As appellants' noted in their brief (p. 24), the Supreme Court in Poller v. Columbia Broadcasting, 368 U.S. 464, 467 (1962) stated that it must be "quite clear what the truth is...[and where] no genuine issue remains for trial ..." before summary judgment can be granted.

In the instant case, and for the reasons set forth above, it was quite clear that the Ciramis could not owe the tax in issue. To conclude that extraordinary circumstances cannot be found where a moving party, namely the United States comes into Court, with "unclean hands" and obtains a judgment which is clearly erroneous and ultimately will destroy a family financially vitiates the intent of Rule 60(b)(6).

Rule 60(b)(6) was created to relieve undue hardship, United States v. Karahalias, 205 F.2d 331, 333 (2nd Cir. 1953) (p. 11 of appellants' brief). In addition, there can be no prejudice to the appellee in vacating the judgment, as the government will ultimately receive what is due and owing in taxes from the Ciramis, Smith v. Jackson Tool & Die Inc., 426 F. 2d 5, 8 (5th Cir. 1970) (p. 11 of appellants' brief).

In finding that appellants have failed to establish any exceptional circumstances, this Court failed to take cognizance of the voluminous records to substantiate the deductions submitted to the Court below, which the government never disputed as being accurate. These records serve as a concrete basis to sustain the validity of the deductions taken. It is equally important to note that the Court below, in its opinion, made no mention of these records. It merely dispensed with the proof submitted by saying that appellants failed to overcome the presumption of correctness of the assessment. (A-152). How unrefuted records of expenses do not overcome a presumption of correctness of an assessment, which is a ministerial docket entry, is beyond comprehension. If ever a case called for the relief sought herein, it is the instant case.

The "extraordinary circumstances" is undue hardship to appellants caused by a motion for summary judgment which was factually untenable in the first instance, which this Court in United States v. Karahalias, 205 F. 2d 331, 333 (2nd Cir. 1953) found to be an appropriate basis for relief. If the judgment stands, complete injustice will result. Even if the sole reason to vacate is to "accomplish justice", which is a standard set forth by the Supreme Court in Klapprott v. United States, 555 U.S. 601, 614 (1949) appellants must prevail on this appeal. Appellants readily agree that sound judicial policy requires that all lawsuits must terminate at some appropriate point in time, but respectfully urge that this doctrine is not applicable to the factual setting herein.

The Court below ruled on appellants' motion without any evidentiary hearing. Having not even cited the records presented in the opinion below, it can only be concluded that the Court did not consider the same. A question of fact is presented - whether appellants can overcome the presumption of the assessments? On this basis alone, the case should be remanded for an evidentiary hearing to see whether the records maintained by independent accountants, as their affidavits

provide, refute the presumption of correctness of the assessment.

Furthermore, if this matter is remanded for an evidentiary hearing, prior counsel's presence can be compelled so that his role can be fully delineated.

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

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May 20, 1976

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DOROTHY BREEN, being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at 136 East 57th Street, New York, N.Y. That on the 21st day of May, 1976, deponent served the within PETITION FOR REHEARING upon SCOTT P. CRAMPTON, Assistant Attorney General, Tax Division, Department of Justice, Washington, D.C. 20530, Attention GEORGE C. WOLF, Attorney for UNITED STATES OF AMERICA, Plaintiff-Appellee in this action, at the above address by Certified Mail, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office - official depository under the exclusive care and custody of the United States Post Office Department within New York State.

Dorothy Breen

Sworn to before me, this
21st day of May, 1976.

STANLEY P. WAGMAN
Notary Public, State of New York
No. 52-9492370
Qualified in Suffolk County
Commission Expires March 30, 1978